United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Docket No. 74-1527 74-1527

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRANCIS C. PLANO, APPELLANT

v.

CLIFFORD W. BAKER, Individually and as Supervising Principal of the Westmoreland Central School District, F. WRIGHT JOHNSON, Individually and as District Superintendent of Schools of Oneida 1-Madison-Herkimer Counties, FRANK R. MELIE, Individually and as Clerk of the Board of Education of Westmoreland Central School District, JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, as Individuals and as Members of the Board of Education of the Westmoreland Central School District, Westmoreland, New York, and the BOARD OF EDUCATION OF THE WESTMORELAND CENTRAL SCHOOL DISTRICT, Westmoreland, New York, APPELLEES.

Appeal from the United States District Court
for the Northern District of New York,
Honorable James T. Foley, Judge Presiding

BRIEF FOR APPELLEES, CLIFFORD W. BAKER, Individually, FRANK R. MELIE, Individually, and JOHN ACEE, CYNTHIA BARNS, JOHN A. NOWAK, JAMES G. PLEHN, BARBARA RICHARDS, MICKEY ROMEO, HOWARD WALKER, Individually.

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ARGUMENT

POINT I: THE TRIAL COURT'S DECISION TO REFUSE TO ACCEPT JURISDICTION OF THE CASE UNTIL SUCH TIME AS STATE ADMINISTRATIVE REMEDIES WERE EXHAUSTED WAS PROPER.

A. Administrative remedies must be exhausted unless inadequate or futile.

Although a Federal equity court does have jurisdiction over a particular proceeding, it may, in its sound discretion, whether its jurisdiction is invoked on the grounds of diversity of citizenship or otherwise, "refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest"; for it is in the public interest that Federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of the state governments in carrying out domestic policy." Burford v. Sun Oil Co., 319 U.S. 315 (1943), at page 317, 318. "...A sound respect for the independence of state action requires the Federal equity court to stay its hand." (page 334)

Exhaustion of state administrative remedies is a prerequisite to an action in Federal court seeking redress for alleged violation of a constitutionally protected right by a state officer, unless state administrative procedures are found to be inadequate or certainly or probably futile. See Eisen v. Eastman, 421 F.2d 560 (2d Cir., 1969). Such remedy must also be "available in practice". See Monroe v. Pape, 365 U.S. 167, 174 (1961).

The holding of Eisen v. Eastman, supra, has been re-affirmed in James v. The Board of Education of Central District No. 1 of the Towns of Addison, et al., 461 F.2d 566 (2d Cir., 1972) where the Court stated, at page 570, "It is still the law of this Circuit...that a Civil Rights plaintiff must exhaust state administrative remedies."

Evidence that the doctrine of exhaustion of remedies is alive and well in the Supreme Court of the United States is found in Preiser v. Rodriguez, 411 U.S. 475 (1973), where the Court said, at page 492:

> "...because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances."

In Christian v. New York Department of Labor, 414 U.S. 614 (1974), where the Court said, at page 622:

> "...there are sound practical reasons for declining [judicial review] where the agency has not had the opportunity to apply its challenged procedure to a determination that is clearly in its subject-matter jurisdiction.
>
> "The most obvious reasons relate to economy. A favorable agency decision on the merits of the claim may moot the objections to the procedure employed. And 'it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages,' McKart v. United States, 395 U.S. 185, 194 (1969)."

In Gibson et al. v. Berryhill et al., 411 U.S. 564 (1973), where the Court stated, at page 574:

> "Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated,..." (Emphasis supplied)

B. Cases cited by the Appellant in support of his position that the exhaustion doctrine is no longer viable were, in each and every instance, decided on the grounds that to require exhaustion would be either futile or inadequate.

In McNeese v. Board of Education, 373 U.S. 668 (1963), the Court found, at page 674, 675:

> "...it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for the protection of their federal rights."

In Damico v. California, 389 U.S. 416 (1967), the Court, in a per curiam decision, based its holding on McNeese, supra, (administrative procedures inadequate) and on Monroe v. Pape, supra. As was stated in McNeese, supra:

> "[42 U.S.C. §1983 was] the statute that was involved in Monroe v. Pape, supra; and we reviewed its history at length in that case. 365 U.S., at 171 et. seq. The purposes were several-fold - to override certain kinds of state laws, to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, although adequate in theory, was not available in practice....'"

In Gibson v. Berryhill, supra, the administrative remedy was found to be inadequate or futile because of bias on the part of the administrative Board.

In James v. Board of Education, supra, the administrative remedy had in fact been exhausted.

In Russo v. Central School District #1, 469 F.2d 623 (2d Cir., 1972), the Court determined that the administrative remedy would be futile since the hearing officer would be bound by his own departmental regulations and New York law which would have mandated a decision against the petitioner.

In Carter v. Stanton, 405 U.S. 669 (1972), the Court based its decision on Damico, McNeese, and Monroe, stating at page 671, "...exhaustion is not required in circumstances such as those presented here." (Emphasis supplied)

In Wilwording v. Swenson, 404 U.S. 249 (1971), the Court stated at page 250:

> "Whether the State would have heard petitioners' claims in any of the suggested alternative proceedings is a matter of conjecture; certainly no available procedure was indicated...."

In Sostre v. McGinnis, 442 F.2d 178 (2d Cir., 1971), at page 182, the administrative procedure was found to be a "meaningless and plainly futile gesture...."

In Goetz v. Ansell, 477 F.2d 636 (2d Cir., 1973), the Court held, at page 637, that there was no real remedy to exhaust because the Commissioner of Education had already ruled on the precise issue in the case. Appellant's contention that Goetz is controlling of the present case because of Matter of Fitzgerald, Commissioner's Decision No. 8795 (March 7, 1974) (see Appendix "A"), does not square with facts, since Fitzgerald involved a substitute teacher. See Canty v. Board of Education, 470 F.2d 1111 (2d Cir., 1972).

C. The State of New York provides a prompt, effective administrative procedure for Appellant to seek remedies for the wrongs he alleges.

> See Appendix "C" for Sections 310 and 311 of the Education Law and Codes and Regulations of the Department of Education.

Appellant's contention (page 27 of Appellant's brief) that §275.16 of the Regulations of the Commissioner of Education constitute a barrier in

that more than 30 days have elapsed since the decision of the Board of Education is without merit. In Matter of Fitzgerald, supra, the Board decision was made on December 13, 1971. The petitioner initially proceeded in the United States District Court, which rendered its decision on March 16, 1973. Thereafter, petitioner proceeded pursuant to §310 of the Education Law, and the Commissioner of Education entertained the appeal, rendering a decision on March 7, 1974. The remedy is certainly "available in practice".

Appellant's contention (page 25 of Appellant's brief) that the decision of the Commissioner of Education may be "final" is likewise without merit. The District Court's decision in the instant case makes clear, at page 8, that the Appellant, if dissatisfied, may appeal to the Federal courts, and in fact, this was the course pursued in James v. Board of Education, supra. Similarly, Appellant's contention (page 22 of Appellant's brief) that there would be no record from which to appeal from a decision of the Commissioner of Education is negated by James v. Board of Education, supra, since that case involved an appeal from a Commissioner's decision directly to the Federal courts.

It is submitted that the Commissioner of Education pays considerably more than "lip service" to the treatment of matters before him (page 24 of Appellant's brief). In Matter of Fitzgerald, supra, the Commissioner, while reaching a decision which Appellant in all likelihood finds unsatisfactory, considered "denial of due process", "subjective expectancy of tenure", and it would seem has made a study of such cases as Perry v. Sindermann, 408 U.S. 593 (1972), and Board of Regents v. Roth, 408 U.S. 564 (1972). In

Matter of Bonnie Stacy, Commissioner's Decision No. 8760 (December 28, 1973) (see Appendix "B"), the Commissioner in effect granted preliminary injunction, thereafter ordered full reinstatement of a probationary teacher and ordered the probationary teacher's continued employment.

It is contended that the facts of this case fall squarely within the concept of the following statement made at page 623 of Christian v. New York State Department of Labor, supra:

> "The regulations appear capable of accommodating various kinds of issues, and their requirements should be construed with an eye to the nature of the agencies involved and the employment relationship. We cannot know at this stage what particular procedures will be applied, whether credibility determinations will arise, how they will be treated if they do,... Removal of these uncertainties from the case may significantly advance judicial resolution of Appellants' claims, while occasioning no great cost to them."

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Dated: July 3, 1974

The University of the State of New York

The State Education Department

Before the Commissioner

IN THE MATTER

of the

Appeal of THOMAS L. FITZGERALD from action of the Board of Education of the Mexico Central School District, with regard to the dismissal of a substitute teacher.

Seidenberg & Strunk, Esqs.....attorneys for petitioner
Faith A. Seidenberg, of counsel

Mowry & Mowry, Esqs.....attorneys for respondent
John B. Mowry, Esq., of counsel

During the fall term of the 1971-72 school year, petitioner was employed by respondent board as a substitute teacher of science and health at the Mexico Academy and Central School. Petitioner was assigned to teach Health 7 and Science 7, the "7" designating the seventh grade, which normally includes students between the ages of 11 and 13.

Petitioner's health course included several areas, one of which was human sexuality. During that phase of the course, petitioner issued an assignment of homework to his students consisting of using a dictionary to ascertain the meaning of certain words used in a supplement to the teaching text. The parents of

several students objected strenuously to this assignment and demanded the immediate dismissal of petitioner. In response, respondent board held a special meeting on December 13, 1971. After the conclusion of the meeting, petitioner was informed by the district principal that respondent board had adopted a resolution ordering his immediate dismissal.

Petitioner then commenced an action against the principal of Mexico Academy and Central School and respondent board in the United States District Court for the Northern District of New York. In a decision dated March 16, 1973, the Court dismissed the complaint against the principal for failure of proof and against respondent board for lack of jurisdiction. The Court's decision with regard to the action against respondent board was that it could not entertain this action since respondent board was not deemed to be a person within the meaning of section 1983 of Title 42 of the United States Code. The Court further pointed out that petitioner had available to him the remedy of an appeal under section 310 of the Education Law, but had not elected to utilize that remedy.

Petitioner now brings this appeal under section 310 of the Education Law, asking that I direct respondent to expunge any reference to petitioner's dismissal from its records. Petitioner also asks that I order respondent to indemnify petitioner for both actual losses suffered and for damages due to pain and suffering.

Petitioner has alleged that his rights were violated by the manner in which respondent board conducted its special meeting of December 13, 1971. He has alleged that he should have been allowed to be present during all deliberations of respondent board, including those had in executive session. The meeting held by respondent was not in the nature of a tenure hearing where petitioner would be entitled to be present. A board of education may meet in executive session to discuss any matter within its jurisdiction (Matter of Everhart, 8 Ed. Dept. Rep. 171). Respondent was under no obligation to admit petitioner to such a session (Education Law, section 1708 subdivision 3). There is also no time limit on the length of an executive session other than that imposed by good judgment and the reasonable exercise of discretion (Matter of Kramer, 72 St. Dept. 114).

The main thrust of petitioner's argument is that respondent's action dismissing him without notice or a hearing constituted a denial of due process. As the United States Court of Appeals for the Second Circuit stated in Canty v. Board of Education of the City of New York, 470 F 2d 111:

> "The mere subjective expectancy of tenure did not entitle appellant to the full scale due process hearing to which a government employee is entitled when his employments falls within the Fourteenth Amendment's protection of liberty and property. See Perry v. Sinderman, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)."

Since petitioner was never appointed to a probationary term but was merely appointed as a substitute for the fall term of the school year in question, it is obvious that he could not have even a "subjective expectancy of tenure" and he therefore was not entitled to a due process hearing. In addition, it should be noted that petitioner suffered no financial harm since the record shows that he was fully compensated for the entire term for which he had been engaged as a substitute.

For the foregoing reasons, the appeal must be dismissed.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 7th day of March, 1974

Commissioner of Education

The University of the State of New York

The State Education Department

Before the Commissioner

IN THE MATTER

of the

Appeal of BONNIE STACY from action of the Board of Education of Romeo Central School District, relating to her dismissal as a probationary teacher.

Bernard F. Ashe, Esq.....attorney for petitioner
James R. Sandner, Esq., of counsel

George Kohn, Esq.....attorney for respondent

Petitioner was appointed to a probationary term as an elementary teacher commencing in September of 1972. While a favorable recommendation by the superintendent during a probationary term is not required under section 3013 of the Education Law in order for a teacher to continue to serve a probationary term, the superintendent did, in fact, recommend to the board on April 24, 1973 that petitioner be retained. In spite of this recommendation, the board voted at its meeting of June 26, 1973 to terminate petitioner's services, effective

June 30, 1973. By my order of August 24, 1973, this action of the board was stayed and petitioner ordered reinstated pending a final determination of this matter on the merits.

The board's position that the recommendation of the district superintendent to retain petitioner was purely arbitrary and against the best interests of the school system is not substantiated in the record before me. In fact, the building principal who observed petitioner in November of 1972 and January of 1973 evaluated her as "satisfactory" or "strong" in all areas. In any event, it is clear that the respondent board acted in violation of the Education Law in dismissing petitioner during her probationary term without a recommendation to that effect from the district superintendent.

Section 3013 of the Education Law provides in part that the services of a probationary teacher "...may be discontinued at any time during such probationary period, upon the recommendation of the district superintendent, by a majority vote of the board of education or trustees." The respondent board's position that a board of education need only consult with the district superintendent concerning a probationary teacher and may thereafter terminate the teacher during the probationary term regardless of the superintendent's recommendation is contrary to the plain language of the section and the decisions of the courts and the Commissioner of Education (Board of Education v. Allen, 293 App. Div. 376; People ex rel. Graves v. Barber, 193 Misc. 325; Matter of Humphrey, 73 St. Dept.

Rep. 185; Matter of Sullivan, 74 id. 52; Matter of Williams, 74 id. 55).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the action of the board of education of Ramsen Central School District, taken at its meeting of June 26, 1973, to dismiss petitioner, is hereby declared null and void and

IT IS FURTHER ORDERED that petitioner be permitted to continue to serve as a probationary teacher in the respondent school district for the duration of her probationary period, unless and until a recommendation that her services be discontinued is made to the board of education by the district superintendent.

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 28th day of December, 1973.

S E A L

/s/Ewald B. Nyquist
Commissioner of Education

NEW YORK

Education Law

§310. Appeals or petitions to commissioner of education and other proceedings.

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

§311. Powers of commissioner upon appeals or petitions, et cetera.

The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

§3031. Procedure when tenure not to be granted at conclusion of probationary period or when services to be discontinued.

Notwithstanding any other provision of this chapter and except in cities having a population of one million or more, boards of education and boards of cooperative educational services shall review all recommendations not to appoint a person on tenure, and, teachers employed on probation by any school district or by any board of cooperative educational services, as to whom a recommendation is to be made that appointment on tenure not be granted or that their services be discontinued shall, at least thirty days prior to the board meeting at which such recommendation is to be considered, be notified of such intended recommendation and the date of the board meeting at which it is to be considered. Such teacher may, not later than twenty-one days prior to such meeting, request in writing that he be furnished with a written statement giving the reasons of such recommendation and within seven days thereafter such written statement shall be furnished. Such teacher may file a written response to such statement with the district clerk not later than seven days prior to the date of the board meeting.

This section shall not be construed as modifying existing law with respect to the rights of probationary teachers or the powers and duties of boards of education or boards of cooperative educational services, with respect to the discontinuance of services of teachers or appointments on tenure of teachers.

Code of Rules and Regulations of the Department of Education (Statutory Authority §311 Education Law)

Section 275.1 - Parties. The party commencing an appeal shall be known as petitioner or appellant and any adverse party, as respondent. After an

appeal is commenced in accordance with these rules, no party shall be joined or be permitted to intervene, except by leave or direction of the Commissioner of Education.

Section 275.2 - Class appeals. (a) When allowed, an appeal may be maintained by one or more individuals on their own behalf and as representatives of a class of named or unnamed individuals only where the class is so numerous that joinder of all members is impracticable and where all questions of fact and law are common to all members of the class. Minor variations of fact shall not preclude the maintenance of a class appeal when such variations are irrelevant for purposes of the decision.

(b) Protective orders. The commissioner may at any stage of the appeal issue such orders as may be necessary to fairly and adequately protect the interests of the persons on whose behalf the appeal is brought.

Section 275.3 - Types of pleadings. There shall be a petition, an answer, and, if new matter is alleged in the answer, a reply thereto. The commissioner may permit or require additional pleadings upon such terms and conditions as he may specify. The form of all pleadings shall be so construed as to do substantial justice. All pleadings must be typewritten, addressed "To the Commissioner of Education", must contain the allegations of the parties in numbered paragraphs and must be filed in accordance with section 275.9 of this Part.

Section 275.4 - Names of parties or attorneys to be endorsed on all papers. All pleadings and papers submitted to the commissioner in connection with an appeal must be endorsed with the name, post office address and telephone number of the party submitting the same, or, if a party is represented by counsel, with the name, post office address and telephone number of his attorney.

Section 275.5 - Verification. All pleadings shall be verified. The petition must be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustee or the board of trustees or board of education of a school district, it must be signed by one of such trustees or a member of such board who is familiar with the facts underlying the appeal, pursuant to a resolution of such board authorizing the commencement of such appeal on behalf of such trustees or board. An answer shall be verified by the oath of the respondent submitting the same. If, however, the appeal is brought from the action of the trustee or the board of trustees or board of education of a school district, verification of the answer shall be made by one of such trustees or a member of such board who is familiar with the facts underlying the appeal. If two or more respondents are united in interest, verification of the answer must be made by at least one of them who is familiar with the facts. A reply shall be verified in the manner set forth for the verification of an answer.

Section 275.7 - Oaths. All oaths required by these rules may be taken before any person authorized to administer oaths within the State of New York. The statement of an attorney admitted to practice in the courts of this State and appearing in an appeal as attorney of record or of counsel to the attorney of record, when subscribed and affirmed by him to be true under the penalty of perjury, may be served or filed in the appeal in lieu of and with the same force and effect as an affidavit.

Section 275.8 - Service of pleadings and supporting documents. (a) Petition. A copy of the petition and of all papers annexed thereto shall be personally served upon each named respondent, or, if he cannot be found upon diligent search, by delivering and leaving the same at his residence with some person of suitable age and discretion, between six o'clock in the morning and nine o'clock in the evening. If a school district is named as a party respondent, service upon such school district shall be made personally by delivering a copy of the petition to the district clerk or to any trustee or any member of the board of education of such school district. Pleadings may be served by any person not a party to the appeal over the age of 18 years.

(b) Subsequent pleadings and papers. All subsequent pleadings and papers shall be served upon the adverse party, or if the adverse party is represented by counsel, upon his attorney. When the same attorney appears for two or more parties, only one copy need be served upon him. Service of all pleadings subsequent to the petition shall be made by registered mail, return receipt requested, or by personal service.

(c) Award of bid. If an appeal involves the award of a contract pursuant to article 5-A of the General Municipal Law or pursuant to subdivision 14 of section 305 of the Education Law and a party other than the appellant has been designated as the successful bidder or has been awarded a contract, such successful bidder must be joined as a respondent and must be served with a copy of the petition. In such case, the respondent board of education or board of trustees shall forward to the commissioner within 20 days after service of the petition on appeal, a copy of the notice to bidders together with proof of publication thereof, a copy of the specifications and copies of all bids or proposals.

(d) Disputed elections. If an appeal involves the validity of a school district meeting or election or the eligibility of a district officer, a copy of the petition must be served upon the trustee or board of trustees or board of education as the case may be, and upon each person whose right to hold office is disputed and such person must be joined as a respondent. In such case, except where the eligibility of a district officer is involved, any qualified voter may serve and file an answer in such appeal, whether or not the trustee or board of trustees or board of education serves and files an answer therein.

Section 275.9 - Filing. Within five days after the service of any pleading or paper, the original, together with the affidavit of verification, an

affidavit proving the service of a copy thereof and the registry receipt where service by registered mail has been effected shall be transmitted to the Office of Counsel, New York State Education Department, State Education Building, Albany, New York, 12224. The affidavit of service shall be in the form set forth below and shall indicate the name and official character of the person upon whom service was made.

Section 275.10 - Contents of petition. The petition shall contain a clear and concise statement of the petitioner's claim showing that the petitioner is entitled to relief, and shall further contain a demand for the relief to which the petitioner deems himself entitled. Such statement must be sufficiently clear to advise the respondent of the nature of petitioner's claim and of the specific act or acts complained of.

Section 275.11 - Notice with petition. Each petition must contain the following notice:

> You are hereby required to appear in this appeal and to answer the allegations contained in the petition. Your answer must conform with the provisions of the rules relating to appeals before the Commissioner of Education, copies of which are available from the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224.
>
> If an answer is not served and filed in accordance with the provisions of such rules, the statements contained in the petition will be deemed to be true statements, and a decision will be rendered thereon by the commissioner.
>
> Please take notice that such rules require that an answer to the petition must be served upon the petitioner, or if he be represented by counsel, upon his counsel, within 20 days after the service of the appeal, and that a copy of such answer must, within five days after such service, be filed with the Office of Counsel, New York State Education Department, State Education Building, Albany, New York 12224.

Section 275.12 - Contents of answer. The answer of each respondent shall contain a clear and concise statement of his defenses to each claim and shall either admit or deny the allegations of the petition. In addition, each respondent may set forth affirmative defenses or defenses by way of avoidance. If more than one respondent has been named and served and if common questions of law or fact are involved, the respondents, if otherwise united in interest, may submit a joint answer to the petition.

Section 275.13 - Service of answer. Each respondent upon whom a copy of the petition has been served must, within 20 days from the time of such service, answer the same, either by concurring in a statement of facts with the petitioner or by service of an answer, together with any necessary supporting documentation. The date upon which personal service was made upon respondent shall be excluded in the computation of the 20 day period. If the last day for service of an answer falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

Section 275.14 - Reply. The petitioner shall reply to each affirmative defense contained in an answer. The reply shall be served within 10 days after service of the answer to which it responds in the manner set forth in section 275.8 (b). If the answer has been served by mail upon petitioner or his counsel, the date of mailing and the two days subsequent thereto shall be excluded in computing the 10 day period. If the last day for service of reply falls on a Saturday or Sunday, service may be made on the following Monday; and if the last day for such service falls on a legal holiday, service may be made on the following business day.

Section 275.15 - Representation by attorney. A party other than a school district or a corporation may prosecute or defend an appeal before the commissioner in person or by an attorney. A school district or a corporate party may appeal only by an attorney.

Section 275.16 - Limitation of time for initiation of appeal. An appeal to the commissioner must be instituted within 30 days from the making of the decision or the performance of the act complained of. The commissioner, in his sole discretion, may excuse a failure to commence an appeal within the time specified for good cause shown. The reasons for such failure shall be set forth in the petition.

Section 275.17 - Amicus curiae. The commissioner may, in his sole discretion and upon written application submitted at or before oral argument, permit interested persons or organizations to submit memoranda of law amicus curiae in connection with a pending appeal. Those permitted to submit memoranda amicus curiae shall not be considered parties to the appeal before the commissioner and shall not be entitled to receive copies of pleadings and papers pertaining thereto or to participate in oral argument.

Section 276.1 - Stay of proceedings. The initiation of an appeal shall not, in and of itself, effect a stay of any proceedings on the part of any respondent. If the petitioner desires a stay, he shall make application therefor by a duly verified petition, stating the facts and the law upon which such stay should be granted. The commissioner may, in his discretion,

with or without application therefor, grant a stay if in his judgment the issuance of such a stay is necessary to protect the interests of the parties, or any of them, pending an ultimate determination of the appeal.

Section 276.2 - Oral argument. (a) If a petitioner desires an opportunity for oral argument before the commissioner, a request therefor must be clearly set forth in the petition. If no such request is made, the respondent, or if there be more than one, a respondent may request oral argument at any time prior to or with the service of an answer. If a petitioner has failed to request oral argument but respondent has made a timely request, petitioner may, within two weeks from receipt of respondent's request, request oral argument on his own behalf.

(b) The commissioner may, in his sole discretion, determine whether oral argument shall be had.

(c) Argument on appeals to the commissioner may be heard before the commissioner, the acting commissioner or the counsel.

(d) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.

(e) Adjournment of the date of oral argument. Once an appeal has been scheduled for oral argument on a particular date by the office of counsel and due notification has been given to the respective parties or their attorneys, no adjournments of that date will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than five days prior to the date on which oral argument is scheduled to be heard, and shall set forth in full the reasons for the request.

(f) The maximum time allotted for oral argument will be 20 minutes for each party except in extraordinary cases where, upon application, the commissioner extends such time.

Section 276.3 - Extensions of time to answer or reply. No extension of time to answer the petition or to reply to an answer will be granted by the commissioner unless timely application is made therefor, upon notice to all parties. Such application shall be in writing, addressed to the office of counsel, must be postmarked not later than five days prior to the date on which the time to answer or reply will expire, and shall set forth in full the reasons for the request. The time to answer a pleading may not be extended solely by stipulation of the parties or their counsel.

Section 276.4 - Briefs. Memoranda of law may be submitted by any party to an appeal or by an amicus curiae, and may be requested by the commissioner or by his counsel.

Section 276.5 - Records and reports. The commissioner may, in his discretion, in the determination of an appeal, take into consideration any

official records or reports on file in the Education Department which relate to the issues involved in such an appeal.

Section 276.6 - Decisions to be filed. A copy of the decision of the commissioner in an appeal will be forwarded by the office of counsel to all parties to the appeal, or, if they be represented by counsel, to counsel for the respective parties, with instructions for service and filing as may be appropriate. A copy will also be sent to those persons or organizations who have been granted leave to submit memoranda amicus curiae.

Section 276.7 - Reopening of a prior decision. Any party to an appeal may, within 30 days after the date of a decision thereon, appeal to the commissioner for a reopening of said decision and for a reconsideration thereof. Service of the application shall be made in the manner set forth for service of an answer. Motions for reopening of a prior decision are addressed solely to the discretion of the commissioner and will not be granted in the absence of a showing that the decision appealed from was rendered under a misapprehension as to the facts or that there is new and material evidence which was not available at the time the original decision was made. Affidavits in opposition to an application for reopening may be submitted by any parties opposing the same. No oral argument shall be had in connection with an application for reopening. If the commissioner finds that there is no adequate basis for a reopening, he will render a decision to the effect.

Section 276.8 - Reargument. (a) If the commissioner, in his discretion, is satisfied that justice will be served by reconsideration of the decision, he will give notice of his decision to all of the parties to the initial decision. The provisions relating to practice and pleadings shall be applicable, and, for the purpose of reargument, the application for reopening shall be treated as the petition. In such case, the commissioner may define and limit the issues to be considered and may restrict the time for service of pleadings.

(b) The commissioner may, on his own motion, reopen a prior decision in the absence of an application therefor where in his judgment the interests of justice will be served thereby.

Section 276.9 - Dismissal of appeal. The commissioner may, in his discretion, and at any stage of the proceedings, dismiss an appeal if it appears to his satisfaction that the petition does not set forth a clear and concise statement of the petitioner's claim or that the appeal has become academic.